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Preprint / Preprint
Zeitschriftenartikel / journal article

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:
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Empfohlene Zitierung / Suggested Citation:
Fehl, C. (2019). Bombs, trials, and rights: norm complexity and the evolution of liberal intervention practices. *Human Rights Quarterly*, *41*(4), 893-915. https://doi.org/10.1353/hrq.2019.0066

Bombs, Trials, and Rights: Norm Complexity and the Evolution of Liberal Intervention Practices

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ABSTRACT

This article analyzes the contested relationship between two practices of intervention on behalf of human rights victims, "humanitarian" military interventions and judicial interventions through international criminal tribunals. While both practices have come to be viewed as complementary instruments in the liberal interventionist "toolbox," their historical evolution was marked by tensions and controversies. To understand both the source of these frictions and how they could be (partly) overcome, the article draws attention to historical and contemporary processes of norm hybridization, that is, to discursive and institutional shifts that have merged different, pre-existing normative ideas into new, complex normative arrangements.

I. INTRODUCTION

It is by now a conventional wisdom that the global rise of human rights norms in the course of the twentieth century has entailed numerous interventions in the internal affairs of states, overwhelmingly by Western liberal democracies, on behalf of the victims of human rights violations. Military humanitarian interventions are but one variant of this interventionism, which has also manifested itself in international criminal prosecutions of rights violations, aid conditionality, rights-based approaches to development, and democracy promotion.[1] Liberal interventionism thus constitutes a bundle of different intervention norms and practices, which have historically co-evolved.[2] And yet, this article seeks to demonstrate, relationships between these different norms and practices are complex and contested, giving rise to normative tensions and dynamics within the liberal interventionist paradigm that merit closer attention by scholars.

The following analysis focuses on the relationship of two norm-based intervention

The Version of Record of this final manuscript has been published in "Human Rights Quarterly" 41.4 (2019), 893–915, © 2019 by Johns Hopkins University Press. DOI: 10.1353/hrq.2019.0066

practices: humanitarian military intervention,[3] on the one hand, and the prosecution of atrocities in international criminal courts and tribunals, on the other. As scholars have noted, military and judicial interventions are both rooted in a liberal notion of universal human rights, and both have come to be viewed as complementary elements of the toolkit which the international community regularly employs in reacting to mass atrocities.[4]

Recent conflicts and crises provide many examples of the close association of both forms of intervention. In the Libyan civil war in 2011, the UN Security Council first referred the situation to the International Criminal Court (ICC) in resolution 1970 and then authorized a military intervention in resolution 1971 only one month later. Equally in 2011, the ICC Prosecutor opened an ICC investigation into the post-election violence that had taken place in Côte d'Ivoire. In this case, the ICC investigation followed in the footsteps of a joint military intervention by French and UN troops. In 2013, the ICC followed a similar pattern in announcing an investigation of crimes committed in Mali, only five days after the start of a French intervention in the country. Even in the ongoing Syrian civil war, where the Council has authorized neither military measures to protect civilians nor an ICC referral, the debate about potential international reactions illustrates the extent to which judicial and military interventions have come to be perceived as a package. Russian representatives, in particular, rejected an ICC referral on the grounds that it would "lay the groundwork for eventual outside military intervention."[5] While this rhetorical move may well have been disingenuous, it was rendered possible by previous crises, most prominently Libya, in which judicial and military interventions took place in close succession.

In light of these recent events and debates, it is easy to overlook that the positive association of military and judicial interventions has historically been neither unambiguous nor

uncontested. In the early 2000s, when the ICC took up its work while governments and experts debated humanitarian intervention under the newly formed notion of a "responsibility to protect," many observers warned against possible negative interaction effects. Some argued that international tribunals could escalate tensions[6] and complicate efforts by external intervening forces to engage in armed mediation to settle conflicts.[7] Others argued that criminal prosecutions could deter humanitarian interventions [8] or serve as a "fig-leaf" for states seeking to avoid costly military measures.[9] These earlier discussions contrast starkly with recent warnings that international criminal justice has become *too* closely linked to military action, potentially undermining its authority.[10]

To shed light on these apparent contradictions in the parallel historical trajectories of judicial and military intervention practices, this article investigates two questions: First, why is it that despite their common roots in liberal human rights norms, the relationship between both forms of intervention has been beset by tensions and controversies? And second, how is it possible that both nevertheless became part of the liberal interventionist toolkit?

To answer these questions, the following analysis traces processes of norm hybridization and resulting problems of norm complexity that have marked the parallel evolution of military and judicial intervention practices. Humanitarian military interventions and international criminal justice interventions are both products of the twentieth century rise of human rights norms, but each is anchored in a distinct mix of human rights norms with older norms of warfare. The article argues that these hybrid normative origins of both intervention practices gave rise to contradictions and tensions between them, but also enabled political efforts to forge new compromises. By tracing political actors' evolving discursive justifications of military and criminal justice interventions, it shows how both forms of intervention were made into

complementary tools by pushing alternative interpretations of their relationship to the background—but not completely – so their association remains fragile and contested.

In developing this argument, the article contributes to a literature on liberal interventionism which has studied both the common origins and the individual trajectories of different rights-related intervention practices, but has paid less attention to their changing and contested relationship. At the same time, it also contributes to research on the evolution of norms in international politics by highlighting how norm-based intervention practices have historically evolved through the hybridization of different normative ideas. While constructivist international relations (IR) theorists have recently drawn attention to the contestedness of norms and dynamics of norm change, they have neglected the internal complexity of norms as both a source and a result of this dynamism.

The remainder of the article is structured as follows: Section two briefly reviews contemporary theoretical approaches to norm dynamics, identifying norm complexity and hybridization as critical gaps in the literature. Section three draws on existing research to highlight the hybrid normative origins of military and judicial intervention practices in the name of human rights. Section four analyses how these hybrid origins shaped the evolving relationship between military and judicial intervention practices. By scrutinizing how political actors justified both forms of intervention at different historical moments, it seeks to demonstrate that the internal normative complexity of both forms of intervention that resulted from hybridization created tensions between them and space for controversies about their relationship. It also shows how these tensions were reduced, albeit not completely resolved, through the construction of new discursive and institutional compromise arrangements.

II. THEORIZING NORM COMPLEXITY

Recent research on norms in international politics has highlighted that even after their adoption, global norms remain malleable and open to different interpretations, giving rise to contestation and norm change.[11] This article's analysis of norm-based intervention practices shares this basic premise of norm dynamism, while highlighting one thus far neglected aspect of norm evolution: the hybridization of different global norms and the resulting internal complexity of norms.[12] This lacuna in existing norms research can be described in terms of three blind spots.

First, many norms researchers have focused on tracing and understanding contestation and change of individual norms, but have bracketed the question of how positive and negative relationships *between* global norms are forged, challenged, and changed. Where they discuss norm conflicts or positive associations between different norms, scholars mostly treat these norm relations as given, exogenous factors that explain why individual norms emerge or fail to emerge,[13] why they become disputed,[14] why certain interpretations prevail,[15] or why some norms are more resilient than others to challenges.[16]

Second, those scholars who do note the active making of norm relationships typically focus on a narrow set of actors and linkages. Drawing particularly on Richard Price's pioneering work on grafting,[17] several contributions show how "norm entrepreneurs" can advance emerging norms by discursively linking them to pre-existing (global or local) norms.[18] While taking a more dynamic view on norm relationships, these studies remain limited by their focus on specific agents (norm entrepreneurs), phases (norm emergence) and types (positive association) of linkage.

The third shortcoming is the lack of interest in the *hybridization* of different global norms –the merging of different normative ideas into a new, complex norm—as an outcome and source

of norm dynamism.[19] This lack of interest appears surprising in light of recent contributions that highlight how global and *local* norms are fused in processes of "norm localization."[20] This article argues that hybridization of different *global* norms is both a frequent outcome and a key driver of norm evolution. This theoretical expectation is based not only on an extension of arguments about global-local hybridity to global-global norm relations, but also on recent proposals to enrich IR norms research with insights from French pragmatist sociology.[21] According to these proposals, the pragmatist argument that social actors constantly manage an irreducible plurality of moral orders can be used to highlight the often overlooked complexity of international norms. Apparently singular norms, such as the whaling ban, can be understood as compromises between different broader evaluative principles, such as sustainability, cultural protection, and science—compromises that remain temporary and fragile, and thus open to challenges by critical actors.[22]

The following analysis builds on and adds to these recent arguments about norm hybridity and norm complexity by analyzing the parallel normative evolution of military and judicial intervention practices. It seeks to explain why the relationship between both forms of intervention has been contested and how they have nevertheless become positively associated as part of the liberal interventionist toolkit. As highlighted by previous studies, each of the two practices can be traced back to discursive and institutional shifts that merged human rights norms—in different ways—with older norms on the use of force. These mergers, it is argued below, can be interpreted as processes of norm hybridization that rearranged old and new normative ideas in specific, complex ways. These complexities, in turn, create opportunities for linking both forms of intervention in different (positive and negative) ways, enabling controversies over their relationship, but also attempts to forge new, hybrid compromise arrangements under the shared roof of liberal interventionism.

III. THE HYBRID ORIGINS OF MILITARY AND JUDICIAL INTERVENTION PRACTICES

The Rwandan genocide and the Balkan wars of the 1990s were the trigger events which paved the way for two distinct modes of post-Cold War liberal interventionism: humanitarian military interventions, as exemplified by NATO's operations in Bosnia and Kosovo, and international criminal prosecutions of human rights violators, first in the International Tribunals for the Former Yugoslavia and Rwanda and then, from 2003 onwards, in the permanent ICC. Both intervention practices were grounded in a normative shift toward conditioning sovereignty on respect for human rights, which activists had advocated since the 1970s.[23] And yet, each practice also has distinct, older historical roots and is reflective of a specific mix of human rights norms with pre-existing normative ideas about the initiation and conduct of war. The following section summarizes existing analyses of these historical mergers, arguing that they constitute instances of norm hybridization.

The term "humanitarian intervention" was coined in the nineteenth century by international lawyers, though the idea has a much longer history. Notions of "just war" that can be traced back to antiquity were infused with humanitarian ideals by renaissance and enlightenment thinkers.[24] By the twentieth century, the protection of universal human rights victim had become the dominant justification for just wars, deviating from the – by then widely accepted – norm of non-intervention.[25] Yet, only the latter was formalized in the UN Charter, whereas "humanitarian intervention" never crossed the threshold of an informal and highly contested moral norm.[26]

Judicial interventions through international tribunals are equally rooted in a—different and more complex—amalgamation of human rights norms with older notions of just war. While

the concept of humanitarian intervention emerged from a confluence of human rights norms with pre-existing normative ideas about just causes for war *(jus ad bellum),* international criminal justice was born from a merger of human rights norms with the second component of the just war doctrine, normative ideas about the just conduct of war *(jus in bello),* or international humanitarian law (IHL). Prior to this merger, IHL had been understood as an inter-state contract that could be enforced through the "collective sanctions of classical international law: belligerent reprisals *durante bello* and war reparations *post bellum."*[27] From the late nineteenth century onwards, the notion of individual human rights began to delegitimize such collective sanctions in the eyes of humanitarian activists and international lawyers.[28] Individual criminal accountability came to be advocated as a more humane mode of IHL enforcement [29] and was eventually institutionalized by the victorious Allies of World War II in the Nuremberg and Tokyo Tribunals.

While the emerging international criminal justice system thus contributed to the "humanization" of IHL,[30] it also took up existing ideas about the *jus ad bellum,* yet in a fundamentally different way than the informal humanitarian intervention norm. While the latter was formed to justify deviations from the non-intervention principle, the Nuremberg Tribunal positively affirmed the same principle by criminalizing aggression as the "supreme international crime."[31] While the tribunal also helped to "legitimate Allied intervention in the war,"[32] this was based on an understanding that defense against aggression had constituted the cause of the intervention.

Of course, the Nuremberg and Tokyo tribunals did not immediately lead to the institutionalization of a permanent international criminal justice system. As Kathryn Sikkink argues, the emergence of international tribunals was only one of two historical "streams" that

eventually produced such a permanent system in the late 1990s. [33] The second "stream" – which reflected the further spread of human rights norms and was unrelated to the ideas about just war that influenced the first stream – emerged in the 1970sand 1980s, when newly democratized European and Latin American countries began to prosecute their former authoritarian leaders in domestic courts for human rights violations committed during their reign. This move toward transitional justice was contested, as many feared that trials could provoke backlashes against new democratic governments. In part to overcome these political objections to domestic prosecutions, their advocates turned to the international community for support. The persistence of a "culture of impunity" in many transitional states became perhaps the most important argument for advocates of a permanent ICC in the 1990s.[34] In 1998, thus, the domestic and international streams flowed together in the establishment of the ICC,[35] which has since become the primary instrument of international judicial intervention.

Humanitarian military interventions and judicial interventions, in short, have their roots in historical processes that combined human rights norms—in different ways—with earlier normative ideas about war and warfare into new normative arrangements. While each of these historical trajectories has been reconstructed in previous studies, IR scholars interested in norm dynamics have failed to take note of them as prominent cases of *norm hybridization*. Furthermore, neither legal nor IR scholars have investigated how their partially shared, hybrid normative origins and resulting internal complexities have shaped the *relationship* between both modes of intervention.

The following section addresses this gap. To capture the evolving relationship between military and judicial intervention practices, it analyses public discursive justifications given by key political actors—including state governments, international organizations, and non-state

activists—for both modes of intervention at different historical moments since 1945. This methodological choice rests on two assumptions which are widely shared among IR scholars interested in the study of norms and discourse in world politics. The first assumption holds that norms, as intersubjective standards of behavior, evolve through discursive arguments.[36] The second assumption holds that although public discourses should not be treated as revealing actors' true motives for engaging in certain practices, they legitimize and enable collective decisions.[37] For reasons of space, the analysis zooms in on discursive shifts that took place after the turn of the millennium, analyzing earlier developments more selectively.

IV. LINKING JUDICIAL AND MILITARY INTERVENTIONS

When the debate about humanitarian intervention was revived and the international criminal justice system took shape in the late 1990s and early 2000s, it was far from clear to contemporaries how these developments would influence one another. As discussed in the introduction to this article, many warned—or hoped—that a permanent ICC would curb Western enthusiasm for military intervention. Some voices, however, also predicted a close association between judicial and military intervention,[38] and it is these predictions that appear to have materialized twenty years on. Military and judicial interventions have gone hand in hand in many recent cases, and recent analyses argue that the ICC has been instrumentalized to legitimize military interventions[39] or "follows the flag" of Western interventions.[40]

Processes of norm hybridization can explain both the initial uncertainty over the relationship between military and judicial interventions and the evolution toward a positive association. As analyzed below, the hybrid normative roots of military and judicial intervention

practices and their resulting internal complexities gave room to both positive and negative interpretations of their mutual relationship. The fact that both have nevertheless become positively associated as complementary tools of liberal interventionism can only be understood by taking into account political efforts to craft new discursive—and to some extent legal—normative compromise arrangements. Specifically, the integration of both intervention practices had to overcome three difficulties: a lack of clarity about the respective *goals* of judicial and military interventions, a mismatch of *scope*, and the potential for a direct *collision* between military intervention and the anti-aggression norm of international criminal law.

A. Realigning the Goals of Judicial and Military Interventions

The first hurdle to integrating military and judicial interventions under the roof of liberal interventionism was a lack of clarity about precisely how their respective *goals* relate to one another, and whether, consequently, any division of labor between both is conceivable.

1. Ambivalent Intervention Rationales

While humanitarian intervention has the straightforward goal of ending ongoing human rights violations, the goals of international criminal justice are more varied and ambiguous, owing in part to the different historical sources and resulting complexity of modern international criminal law.

The question of "why punish" has occupied philosophers for centuries, and continues to be debated in domestic as well as international criminal law.[41] Classical punishment rationales

include retribution, the goal of righting past wrongs, and deterrence, the goal of discouraging other would-be perpetrators. More recently, legal theorists have emphasized expressivism—the goal of affirming a community's values—and restorative justice, which includes the goals of compensating victims and fostering societal reconciliation.

Among these punishment rationales, legal deterrence is most closely related to the goal of humanitarian military intervention. And while the deterrence argument played a role in each of the historical streams that became hybridized in modern international criminal law, there was a considerable variation across those streams in arguments about what deterrence meant and how it would work—suggesting different possible connections to military measures.

For the post-World War II Nuremberg and Tokyo tribunals, deterrence was still secondary to retributive justifications.[42] It was also described as a long-term strategy that *followed* a victorious military intervention [43]—an intervention that was justified not as a humanitarian one but as defense against aggression. However, it is often overlooked that even with regard to WW II crimes, discussions of deterrence were not limited to a post-conflict, post-intervention context. Already in the final years of the war, the Allies issued repeated warnings to the officers of Hitler's retreating army that they would be held accountable after the war for any atrocities they were about to commit. At the 1943 Moscow Conference, for instance, they declared:

> Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusors in order that justice may be done.[44]

In the first historical stream that came to shape international criminal justice, thus, legal deterrence was framed as working both during and after armed conflict, as a complement to

military action.

In the domestic transitional justice processes that contributed to the emergence of the international criminal justice system in the second historical stream, the emphasis shifted from retributive and deterrence-based motives—the 1980s trials in Argentina, for instance, were directly inspired by Carlos Nino's "consensual theory of punishment" combining both of these elements—[45] toward restorative justifications.[46] In this context, legal deterrence was portrayed as a long-term endeavor working outside the context of armed conflict and without any external military interference.

When these two historical streams were merged, all of the punishment rationales expressed in them were embraced by the post-Cold War international criminal justice system.[47] Yet it was the deterrence rationale that moved to the foreground of the international criminal justice discourse, and earlier ideas about legal deterrence were brought together. The notion that legal deterrence can work during an ongoing conflict—as reflected in the Allies' statements during World War II—was combined with the argument—formed in later domestic transition processes—that legal deterrence can work without external military intervention. The result was a new "specific deterrence" argument voiced particularly strongly by non-governmental activists. According to this argument, prosecutions could be used during conflicts to end ongoing atrocities without external military intervention, by delegitimizing and marginalizing indicted actors.[48] International criminal justice thus began to be portrayed as an alternative to military intervention, not only by activists but also increasingly by government officials. For instance, the hope to avoid a costly military intervention played an important role in Western governments' decision to set up the International Tribunal for the former Yugoslavia (ICTY).[49]

And yet, the argument that justice could substitute for military intervention never fully

replaced alternative framings of the relationship between judicial and military measures that continued to exist within the complex international criminal justice discourse. The Nuremberg model of legitimating military interventions with criminal prosecutions also continued to be applied—but now to interventions justified with humanitarian ends. Again, this dynamic played out most visibly in the Balkans, when NATO's eventual intervention in Bosnia and, later, its intervention in Kosovo, drew legitimacy from the ICTY.[50] Another alternative perspective that became prominent in the 1990s framed criminal justice as part of a broader liberal peacebuilding paradigm, echoing the emphasis of earlier domestic trials on societal reconciliation and placing justice in a post-conflict context.[51]

To summarize, in the 1990s a stronger emphasis on legal deterrence produced a stronger convergence between the stated goals of military and judicial interventions but left open the question of whether judicial interventionism could serve as a *substitute* for—and potential challenge to—military interventionism, or as a *complement* that either legitimates the use of force or follows its cessation.

2. Realigning Rationales Under Responsibility to Protect

This ambivalence was initially maintained, and even cemented, by the integration of judicial and military interventions under the conceptual roof of the "Responsibility to Protect" (R2P) which emerged from attempts to balance the burgeoning human rights interventionism with the norm of state sovereignty.[52] The *International Commission on Intervention and State Sovereignty* (ICISS), which first elaborated the concept, sought to achieve this delicate balance with a dual move. First, external interventions were legitimated by conditioning sovereignty on a state's

fulfillment of its protection duty toward its own citizens. Second, the particularly controversial practice of military intervention in reaction to protection failures[53] was placed within a "continuum" of crisis responses that included a range of non-military measures, as well as pre- and post-crisis responsibilities in addition to the "responsibility to react."[54]

International criminal justice, and the ICC in particular, was key to the second of these discursive moves. By emphasizing the ICC's preventive function and its contribution to post-conflict peacebuilding, R2P advocates framed judicial interventions as part of the responsibility to prevent and responsibility to rebuild.[55] This interpretation reflected the notion of a division of labor, with military intervention as a reactive tool of short-term crisis management and judicial intervention as a long-term instrument of prevention and stabilization. At the same time, however, the ICISS report also portrayed judicial intervention as a possible alternative to military action in reacting to ongoing violence: "By far the most controversial form of [. . .] intervention is military [. . .]. But we are also very much concerned with alternatives to military action, including [. . .] coercive intervention measures—sanctions and criminal prosecutions—falling short of military intervention."[56]

By maintaining this ambivalence about the relationship of judicial and military measures, the ICISS report offered something both to supporters of military humanitarian intervention that viewed judicial interventions as complementary and to critics that insisted on non-military alternatives even at the height of crisis. Over time, however, this compromise arrangement proved too fragile to maintain.

In particular, the emphasis on the instrumental value of international judicial interventions invited counter-arguments that questioned their value on instrumental grounds.[57] As mentioned above, the critics of domestic human rights trials already voiced objections to

criminal prosecutions in the 1970s and 1980s. With international criminal justice being presented as an instrument in the R2P toolbox, these long-standing instrumental objections also gained prominence among practitioners and commentators. Often, they took the form of warnings against a "peace versus justice" dilemma,[58] casting particularly strong doubt on the idea that trials could serve as instruments of short-term deterrence and crisis management.

The possibility that the goals of peace and justice might clash at least in the short term was already implicitly recognized by the drafters of the ICC Statute, which gave the UN Security Council the authority not only to refer cases to the court, but also to *defer* them.[59] While the Council has not yet used the latter option,[60] the peace versus justice discourse has remained powerful both among UN member states and in the UN bureaucracy. For instance, Jean-Marie Guéhenno, the longstanding head of UN peacekeeping, criticizes the ICC intervention in Darfur as "dangerous" and "careless" in his memoirs.[61]

States, NGOs, and international organizations sought to defend international criminal justice against this persistent critique. In 2007, for instance, the governments of Finland, Germany, and Jordan hosted an international conference that brought together academics, governments and NGOs and resulted in the adoption of the Nuremberg Declaration on Peace and Justice. The Declaration claims that "[p]eace and justice, if properly pursued, promote and sustain one another. The question can never be whether to pursue justice, but rather when and how." (III.1) In this and other formulations, the drafters implicitly acknowledge peace versus justice dilemmas if both aims are *not* "properly pursued." Recognizing the "imperative to stop the fighting" (IV.1.1), as well as the need to combine prosecutions with non-retributive forms of transitional justice, the Declaration emphasizes the long-term benefits of justice.[62] Thus, it steps back from specific deterrence claims, undermining the argument that judicial intervention could

serve as a substitute for military measures.

UN reports on the R2P have moved in a similar direction. The UN Secretary General, for instance, argued in his 2009 report that crisis mediators could try to "dissuade [conflict parties] from destructive courses of action that could make them subject to prosecution by the International Criminal Court."[63] In this reading, it is no longer actual trials that exert a specific deterrent effect but the threat of a potential judicial intervention. The 2015 report mentioned the "prospect of prosecution by the International Criminal Court" merely in passing,[64] and the 2017 report only affirmed the ICC's long-term contribution to the "non-recurrence" of atrocity crimes.[65] Despite this gradual discursive shift, specific deterrence claims have not disappeared from global political debates. For instance, Western diplomats justified the UN Security Council's referral of the situation in Libya to the ICC as a "move [. . .] designed to change the mindset of those around Gaddafi,"[66] and states demanding a referral of the Syrian situation argued that "such a warning would have an important dissuasive effect."[67] In neither case, however, was legal deterrence portrayed as an effective alternative to military measures. In the Libyan case, the ICC referral was quickly followed by a Western military intervention to end atrocities. In the case of Syria, specific deterrence claims were countered by "peace versus justice" arguments, as exemplified by Hilary Clinton's warning in 2012 that calling Bashar Al-Assad a war criminal could "complicate a resolution of a difficult, complex situation."[68]

In summary, the integration of judicial and military intervention measures in the R2P framework did not initially privilege any of the conceivable alternative interpretations of their relationship. Over time, this ambivalent compromise gave way to a predominant emphasis on a division of labor. And yet, the discursive construction of this complementary relationship could not succeed without overcoming two further obstacles: a mismatch of scope between norms of

military and judicial intervention, and the potential of a collision between military humanitarian intervention and the prohibition of aggression under international criminal law.

3. Readjusting the Scope of Intervention

The hybrid origins of military and judicial intervention practices did not only generate ambivalence about their respective rationales, but also a mismatch of scope: the range of human rights violations justifying intervention into a given crisis was defined differently in both normative contexts.

With regard to military humanitarian intervention, the marriage of human rights norms with ideas of just war did not, per se, restrict the universe of violations warranting intervention. Consequently, humanitarian interventions were justified in the 1990s and 2000s with purposes ranging from protecting Bosnian civilians from ethnic cleansing and genocide to enforcing access for humanitarian aid in Somalia to restoring Haiti's democratic government after a military coup to protecting women's rights in Afghanistan.[69]

In comparison, the specific mix of human rights, *jus ad bellum* and *jus in bello* norms that gave rise to international criminal law produced a narrow focus on four crimes: genocide, crimes against humanity, war crimes, and aggression. While war crimes are a traditional IHL concept, the Nuremberg Tribunal first recognized crimes against humanity and genocide as international crimes that reflected a broader notion of human rights,[70] albeit still with a nexus to armed conflict. The crime of aggression added twentieth century *jus ad bellum* to the mix. When international criminal law took its contemporary shape in the 1998 Rome Statute, the scope of relevant violations was somewhat broadened by dropping the link to armed conflict for genocide and crimes against humanity and by extending the category of war crimes to cover non-international armed conflicts.[71] These revisions reflected the legacy of the 1970s and 1980s

domestic trials, but the ICC Statute was still much narrower than the scope of human rights violations cited to legitimize military interventions.

When the ICISS sought to integrate military and judicial intervention measures under the roof of the R2P, the commission thus faced the somewhat paradoxical situation that the (legally binding and widely recognized) normative framework of international criminal law enabled judicial responses to only a narrow set of abuses, whereas the (informal and politically contested) norm of humanitarian intervention justified military responses to a much wider set of crimes. To maintain both practices under a common framework, it was necessary to re-align their scope. The 2001 ICISS report resolved the contradiction only in part. The document still referred in rather vague terms to states' "responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation."[72] In elaborating what would constitute a just cause for intervention, the document further argued that

> there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind: A. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or B. large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.[73]

While these formulations already placed stronger emphasis than earlier justifications of military interventions on rights violations of a particularly high gravity, they were still open to including a broad array of state policies into the list of potential intervention triggers. It was not until 2005 that UN member states, in officially endorsing the R2P concept at the World Summit, clearly limited its scope to the gravest violations. The state's protection duty was now defined as a "responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[74] The new language almost exactly mirrored the core crimes as defined under

the ICC Statute—with the exception of aggression, which is not a violation of individual rights.[75]

The institutionalization of the R2P thus re-adjusted the scope of military humanitarian intervention to match the traditionally narrower scope of judicial intervention. This re-alignment, it should be noted, was driven less by an abstract dispute about logical contradictions between the R2P and international criminal law than by a political controversy over a specific intervention. US and British attempts to justify the 2003 Iraq war with references to R2P were widely perceived as an abuse of the concept, and propelled efforts to clarify the conditions for its applicability.[76] And yet, the *kind* of clarification that was reached in 2005 did not incidentally echo international criminal law's emphasis on four core crimes. The establishment of a direct link between international criminal justice and just causes for intervention allowed R2P proponents to borrow from the legitimacy of international criminal law, which was much more firmly established than the contested humanitarian intervention norm. As David Scheffer, former US Ambassador-at-Large for War Crimes, argues:

> The identification of genocide, war crimes, ethnic cleansing, and crimes against humanity as the premise for prevention or action under R2P derives much of its legitimacy from the jurisprudence of the international and hybrid criminal tribunals built during the 1990s [. . .] and the permanent International Criminal Court (ICC)."[77]

According to Scheffer, the atrocity focus of R2P—which he advocates—does *not* imply that political leaders need to wait for an ICC judgment before launching a military R2P operation. Even without or before a judgment, the link facilitates the task of publicly justifying why military action is needed. In Scheffer's words, " 'atrocity crimes' is terminology that [. . .] enables timely public discourse" about "effective responses" to events.[78]

Thus, the realignment of military and judicial intervention triggers not only delegitimized the most controversial military responses to rights violations, it also helped intervention

proponents—in all the other cases that clearly fall within the scope of the core crimes—to tap into international criminal justice as a resource for *legitimating*, rather than replacing, military responses to mass atrocities.

In 2011, the Western intervention in Libya demonstrated this legitimizing effect in practice. For instance, NATO Secretary General Anders Fogh Rasmussen commented on the issuing of the ICC arrest warrants against Al-Gaddafi and other regime figures by claiming: "This decision once again highlights the increasing isolation of the Gaddafi regime. It reinforces the reason for NATO's mission to protect the Libyan people from Gaddafi's forces."[79]

3. Averting a norm collision

If the readjustment of scope allowed proponents of military humanitarian intervention to draw on international criminal justice as a source of legitimacy, this legitimizing power could only be harnessed in full if a further obstacle could be overcome: the potential for humanitarian military interventions to collide with international criminal law's prohibition of aggression. The source of this potential collision, once more, lies in the hybrid normative origins of both practices. As discussed above, the practices of humanitarian military intervention and judicial intervention drew in radically different ways on pre-existing *jus ad bellum* norms: the humanitarian intervention concept legitimized deviations from the nascent norm of non-intervention, whereas international criminal justice embraced and consolidated it in the prohibition of aggression.

In the post-World War II setting, this normative tension between both forms of intervention did not yet materialize into a real political problem. Since the Allied war effort was justified not in humanitarian terms but as defense against aggression, the Nuremberg prohibition

of aggression even helped to legitimize Allied intervention against the Axis powers. Political circumstances had changed dramatically, however, when the ICC Statute was negotiated half a century later. The humanitarian interventions of the 1990s were not directed against states that had engaged in aggressive behavior toward the outside world. It was therefore clear to negotiators that including the crime of aggression in the Rome Statute could—depending on its definition—create a new legal tool for challenging and deterring humanitarian military interventions, particularly those conducted without Security Council authorization. This concern was voiced most strongly by US policymakers before and during the Rome negotiations and contributed to American hostility toward the new court.[80] In 1995, for instance, a US legal adviser warned in a UN General Assembly debate about the establishment of a permanent ICC:

> The Nuremburg Tribunal did not have to confront this problem, as it was dealing, after the fact, with a clear and specific case. In the abstract, however, it is not at all universally established what fits even within the limited concept of 'waging a war of aggression.' What are the possible defenses or mitigating factors in connection with such a charge? [. . .] What about controversial concepts such as humanitarian intervention or a war of liberation?[81]

At the same time, the possibility that the future ICC could deter military humanitarian interventions by prosecuting aggression was a reason why so many states from the Global South were strongly in favor of including the crime in the Rome Statute.[82] In 1998, negotiators agreed on a compromise that included aggression in Article 5 of the ICC Statute, but stipulated that the court could not exercise jurisdiction over it until a consensus definition had been agreed.

In the negotiations leading up to the 2010 ICC Review Conference in Kampala, the unresolved question of humanitarian intervention thus loomed large.[83] The idea of explicitly exempting humanitarian uses of force from the definition of aggression was advocated most vocally by the United States, which—despite its non-membership of the court—became involved

in the late stages of the Kampala preparation process as an observer state. By this time, however, a Special Working Group had already agreed on a consensus formulation defining the crime of aggression as an "act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[84] When US negotiators raised objections to this formulation, other states were unwilling to reopen negotiations on the agreed compromise.

Instead, US concerns were dealt with as part of a separate negotiation process at Kampala that sought to clarify the meaning of manifest violations in a series of understandings to be adopted by ICC states parties in addition to the formal statute amendments.[85] Even in this negotiation track, US negotiators failed to gain sufficient support for a formulation which stated that "an act undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6 [genocide], 7 [crimes against humanity] or 8 [war crimes] of the Statute would not constitute an act of aggression."[86]

However, it is worth noting that the eventually agreed formula for determining whether an act of aggression has been committed which "requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations" (Understanding 6) was interpreted by observers as opening the door to a differentiation between humanitarian and other uses of force violating the UN Charter.[87]

In addition, the rules adopted at Kampala on the ICC's exercise of jurisdiction over aggression also made it less likely that the court will prosecute uses of force such as the contested Kosovo intervention. If ICC jurisdiction is triggered by a state referral or undertaken on the Prosecutor's own initiative, the ICC cannot exercise jurisdiction over the nationals of ICC

non-members; ICC states parties, on the other hand, can protect their nationals with an "opt-out."[88] Negotiators also agreed at Kampala to defer the activation of the ICC's jurisdiction over aggression for another seven years, requiring two thirds of ICC members to adopt an activating decision in 2017.

The discussion about aggression was thus not over after Kampala. The United States in particular continued to worry that ICC jurisdiction over aggression would obstruct legitimate uses of force, including for humanitarian purposes. As US legal advisers explained:

> [T]here is a concomitant risk that a broad or vague definition will [. . .] discourag[e] states from using force in cases where they should. [. . .] Ironically, one such result could be that the ICC ends up prolonging violence and abuses of human rights by deterring future military actions—for example, ones parallel to the intervention frequently urged in Rwanda in 1994—aimed at stopping the commission of genocide, war crimes, and crimes against humanity, which the Rome Statute sought to eliminate.[89]

While the authors argue that the exclusion of humanitarian interventions is implicit in Understanding 6, they contend that "the Kampala conference's reluctance to address explicitly such an important concern leaves the issue with an unfortunate ambiguity that may make it harder to prevent atrocity crimes in the future."[90]

The United States was not the only state that remained skeptical of the Kampala compromise. France and the United Kingdom sought to reinforce protections for ICC member states by insisting that the ICC could only exercise jurisdiction for aggression over the nationals of those member states that had ratified the aggression amendment—effectively an opt-in rather than an opt-out regime. Despite widespread opposition to this interpretation, the majority of member states eventually accepted the minority view so as to enable a consensual activating decision at the ICC's 2017 Assembly of States Parties.[91]

Thus, when the ASP decision entered into force on 17 July 2018, the ICC's jurisdiction

over aggression had been restricted substantively and procedurally by including multiple protections for states (both ICC members and non-members) potentially involved in military humanitarian interventions. In the eyes of one analyst, this outcome was "quite ironic because it means that the 4 states that had conducted the Nuremberg prosecutions are either now caved out of crime of aggression jurisdiction (the US and Russia as non-States Parties) or can easily do so by not ratifying the amendment (the UK and France)."[92] In light of the above analysis, however, the "ironic" outcome appears as a coherent part of a larger process through which historically rooted tensions between military and judicial interventions were overcome by forging normative compromises. The aggression compromise enabled a complementary understanding of military and judicial interventions—as it had already prevailed at the time of the Nuremberg tribunal—to live on under the changed geopolitical circumstances of the post-Cold War world.

V. CONCLUSION

The rise of liberal human rights norms, it has often been argued, has led to a liberal interventionism in the name of individual human rights in the post-Cold War era. This article unpacks this rights-based interventionism, scrutinizing the specific historical trajectories of (some of) its individual components and the evolution of their interrelationship. Focusing specifically on humanitarian military interventions and judicial interventions through international criminal tribunals, the preceding analysis highlights how each of these practices emerged from a hybridization of human rights norms with pre-existing norms of warfare, and how these hybrid origins created room for ambiguity and controversy concerning their mutual relationship. The fact that both practices of intervention have come to be interpreted as

complementary tools of liberal interventionism, it is argued, must be understood as the outcome of discursive and institutional compromises that were forged to overcome normative tensions. In particular, the rationales of military and judicial interventions were gradually re-interpreted to allow for an integration of both measures as complementary (rather than alternative) tools of the responsibility to protect; the scope of the responsibility to protect was narrowed to mirror the focus of international criminal law on four core crimes; and potential legal challenges to humanitarian intervention were overcome by limiting the ICC's jurisdiction over aggression through definitional and jurisdictional safeguards.

In highlighting the historical origins of norm complexity and strategies for dealing with it, the article makes the broader theoretical point that processes of hybridization between different global norms constitute both sources and products of norm dynamism. The historical trajectories of military and judicial intervention practices and their underlying norms exemplify a cyclical move: different normative elements are hybridized into new global norms, whose resulting internal complexity opens up room for contestation over their relationship with other global norms, leading political actors to forge new compromise arrangements. This dynamic also suggests that present consensus about the relationship between judicial and military interventions should not be viewed as an end state of the debate. As the preceding analysis demonstrates, hybrid norms always remain fragile and open to challenges by political actors that can draw on their various elements to creatively rearrange them in new situations.

Endnotes

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The author would like to thank Philip Liste, Max Lesch, and Leslie Vinjamuri for their comments on previous versions of this text and exchanges on ideas discussed in it.

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[1] For supportive views, see e.g. FERNANDO R. TESÓN, THE LIBERAL CASE FOR HUMANITARIAN INTERVENTION (2001); THOMAS G. WEISS, HUMANITARIAN INTERVENTION: IDEAS IN ACTION (2nd ed. 2007); NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY (2000); for critical perspectives, see e.g. David Chandler, *The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda*, 23 HUM. RTS. Q. 678 (2001); DAVID CHANDLER, FROM KOSOVO TO KABUL: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION (2002); COSTAS DOUZINAS, HUMAN RIGHTS AND EMPIRE: THE PHILOSOPHY OF COSMOPOLITANISM (2007); ANNE ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW (2008).

[2] Norms are understood here as "standard[s] of appropriate behavior for actors with a given identity," following Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L. ORG. 887, 891 (1998). This broad understanding encompasses legal norms as well as uncodified, informal norms. Military and judicial interventions are referred to as "practices" in the sense of patterned political behavior justified with reference to norms.

[3] While the use of the adjective "humanitarian" for military interventions has been politically contested, the term is used here as a shortcut for military interventions justified as a response to human rights violations.

[4] Fréderic Mégret, *ICC, R2P, and the International Community's Evolving Interventionist Toolkit*, 22 FINN. YEARB. INT'L. L. 21 (2011); *see also* CHANDLER, FROM KOSOVO TO KABUL, *supra* note 1.

[5] Russia's Statement at UNSC: French Resolution 'betrayal' of Syrian people, RT.COM, (22 May 2014), http://rt.com/politics/official-word/160860-syria-russia-veto-churkin/.

[6] *See, e.g.*, Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L. SECUR. 5 (2003).

[7] Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 HUM. RTS. Q. 90, 116 (2000).

[8] Thomas W. Smith, *Moral Hazard and Humanitarian law: The International Criminal Court and the Limits of Legalism*, 39 INT'L. POL. 175, 186 (2002).

[9] Frédéric Mégret, *Three Dangers for the International Criminal Court: A Critical Look at a consensual project*, 12 FINN. Y.B. INT'L. L. 193, 209 (2001); *see also*; Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 INT'L. ORG. 655, 681 (2001); Smith, *supra* note 8, at 177.

[10] Ruben Reike, *Is the relationship of the ICC and R2P Truly "win-win*"? OPENDEMOC. (22 June 2015), https://www.opendemocracy.net/openglobalrights/ruben-reike/is-relationship-of-icc-and-r2p-truly-"winwin"; Leslie Vinjamuri, *The International Criminal Court and the Paradox of Authority*, 79 L. CONTEMP. PROBL. 275 (2016).

[11] *See, e.g.*, Antonio Arcudi, *The Absence of Norm Modification and the Intensification of Norm Contestation: Africa and the Responsibility to Prosecute*, 11 GLOBAL R2P 172 (2019); Cristina G. Badescu & Thomas G. Weiss, *Misrepresenting R2P and Advancing Norms: An Alternative Spiral?*, 11 INT. STUD. PERSPECT. 354, 362 (2010); Carrie Booth Walling, *Human Rights Norms, State Sovereignty, and Humanitarian Intervention*, 37 HUM. RTS. Q. 383 (2015); Nicole Deitelhoff & Lisbeth Zimmermann, *Things We Lost in the Fire: How Different Types of Contestation Affect the Robustness of International Norms*, INT'L. STUD. REV. 1 (2018); Mona Lena Krook & Jacqui True, *Rethinking the Life Cycles Of International Norms: The United Nations and the Global Promotion of Gender Equality*, 18 EUR. J. INT'L. RELAT. 103 (2010); Eva Ottendörfer, *Contesting International Norms of Transitional Justice: The Case of Timor Leste*, 7 INT'L. J. CONFLICT AND VIOLENCE 24 (2013); Wayne Sandholtz, *Dynamics of International Norm Change: Rules Against Wartime Plunder*, 14 EUR. J. INT'L. RELAT. 101 (2008); Lisa Vanhala, *The Diffusion of Disability Rights in Europe*, 37 HUM. RTS Q. 831 (2015); ANTJE WIENER, A THEORY OF CONTESTATION (2014).

[12] I understand "hybridization" as referring to a process in which two norms or normative ideas become merged into a new whole. "Complexity" characterizes norms that have different internal components. Complexity can, but need not result from hybridization.

[13] ELVIRA ROSERT, DIE NICHT-ENTSTEHUNG INTERNATIONALER NORMEN: PERMISSIVE EFFEKTE IN DER HUMANITÄREN RÜSTUNGSKONTROLLE (2019).

[14] Sandholtz, *supra* note 11 at 109; Antje Wiener & Uwe Puetter, *The Quality of Norms is What Actors Make of it: Critical Constructivist Research on Norms*, 5 J. INT'L. L. INT'L. RELAT. 1, 14 (2009); Carmen Wunderlich, *Theoretical Approaches in Norm Dynamics, in* NORM DYNAMICS IN MULTILATERAL ARMS CONTROL: INTERESTS, CONFLICTS, AND JUSTICE 20 (Harald Müller & Carmen Wunderlich eds., 2013).

[15] Sandholtz, *supra* note 11 at 109.

[16] Jeffrey S. Lantis & Carmen Wunderlich, *Resiliency Dynamics of Norm Clusters: Norm Contestation and International Cooperation*, 44 REV. INT'L. STUD. 570 (2018).

[17] Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT'L. ORG.. 613, 617 (1998).

[18] *See, e.g*. R. Charli Carpenter, *Studying Issue (Non)-Adoption in Transnational Advocacy Networks*, 61 INT'L. ORG. 643 (2007); Martha Finnemore & Duncan B. Hollis, *Constructing Norms for Global Cybersecurity*, 110 AM. J. INT'L. L. 425 (2016); Gregor P. Hofmann & Kavitha Suthanthiraraj, *Norm Contestation and Adaptation: R2P's Reframing Over Time,* 11 GLOBAL R2P 226 (2019); on linkage arguments connecting different human rights norms, see also James W. Nickel, *Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights*, 30 HUM. RTS Q. 984 (2008).

[19] One notable exception is Moore's analysis of different principles of equity that became hybridized in UN climate negotiations, see Frances C. Moore, *Negotiating Adaptation: Norm Selection and Hybridization in International Climate Negotiations*, 12 GLOB. ENVIRON. POL. 30 (2012).

[20] Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 INT'L. ORG. 239 (2004); David Capie, *Localization as Resistance: The Contested Diffusion of Small Arms Norms in Southeast Asia*, 39 SECUR. DIALOGUE 637 (2008); Lisbeth Zimmermann, *Same Same or Different? Norm Diffusion Between Resistance, Compliance, and Localization in Post-conflict States*, 17 INT'L. STUD. PERSPECT. 98 (2016).

[21] Frank Gadinger, *On Justification and Critique: Luc Boltanski's Pragmatic Sociology and International Relations*, 10 INT'L. POL. SOCIOL. 187 (2016); Max Lesch, *Praxistheorien und Normenforschung in den Internationalen Beziehungen. Zum Beitrag der pragmatischen Soziologie*, DISKURS 31 (2017); see also Caroline Fehl, *Navigating Norm Complexity: A Shared Research Agenda for Diverse Constructivist Perspectives* (PRIF Working Paper No. 41, 2018).

[22] Lesch, *supra* note 21, at 44.

[23] CHANDLER, FROM KOSOVO TO KABUL, *supra* note 1, at 131; *see also* MARTHA FINNEMORE, THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE (2003); WHEELER, *supra* note 1.

[24] ALEXIS HERACLIDES & ADA DIALLA, HUMANITARIAN INTERVENTION IN THE LONG NINETEENTH CENTURY: SETTING THE PRECEDENT (2015); THE EMERGENCE OF HUMANITARIAN INTERVENTION: IDEAS AND PRACTICE FROM THE NINETEENTH CENTURY TO THE PRESENT (Fabian Klose ed., 2016).

[25] CHANDLER, FROM KOSOVO TO KABUL, *supra* note 1, at 131; *see also* Walling, *supra* note 11, at 387.

[26] Martha Finnemore, *Constructing Norms of Humanitarian Intervention, in* THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 153 (Peter J. Katzenstein ed. 1996).

[27] Georges Abi-Saab, *International Criminal Tribunals and the Development of International Humanitarian and Human Rights Law*, *in* LIBER AMICORUM: JUDGE MOHAMMED BEDJAOUI 649, 650 (Emile K.M. Yakpo & Tahar Boumedra eds., 1999), emphasis in the original.

[28] Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L. L. 239, 247 (2000).

[29] Patryk I. Labuda, *The Lieber Code, Retaliation and the Origins of International Criminal Law*, *in* HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW: VOL. 3, at 299 (Morten Bergsmo et al. eds., 2015).

[30] Meron, *supra* note 28.

[31] *Cited in* Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains*, 41 CASE WEST. RESERVE J. INT'L. L. 291, 312 (2009).

[32] Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 73 (2003).

[33] KATHRYN SIKKINK, THE JUSTICE CASCADE. HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 96–128 (2011).

[34] Caroline Fehl, *Explaining the International Criminal Court: A "Practice Test" for Rationalist and Constructivist Approaches*, 10 EUR. J. INT'L. RELAT. 357 (2004); Max Pensky, *Amnesty on Trial: Impunity, Accountability, and the Norms of International Law*, 1 ETHICS GLOB. POLIT. 1 (2008).

[35] SIKKINK, *supra* note 33

[36] *See, e.g.*, Walling, *supra* note 11, at 387; DEITELHOFF & ZIMMERMANN, *supra* note 11; Sandholtz, *supra* note 11; WIENER, *supra* note 11.

[37] Walling, *supra* note 11, at 387; Tine Hanrieder, *The False Promise of the Better Argument*, 3 INT'L. THEORY 390, 395 (2011); Markus Kornprobst, *From Political Judgements to Public Justifications (and Vice Versa): How Communities Generate Reasons Upon Which to act*, 20 EUR. J. INT'L. RELAT. 192 (2014).

[38] CHANDLER, FROM KOSOVO TO KABUL, *supra* note 1, at 147–48; Mégret, *supra* note 9, at 224–25.

[39] Mark Kersten, *A Fatal Attraction? Libya, the UN Security Council and the Relationship Between R2P and the International Criminal Court*, *in* MOBILIZING INTERNATIONAL LAW FOR 'GLOBAL JUSTICE' 142 (Jeff Handmaker & Karin Arts eds., 2018); Mégret, *supra* note 4; Sarah M.H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L. L. 941 (2011).

[40] Leslie Vinjamuri, *Is the International Criminal Court Following the Flag in Mali*?, POLITICAL VIOLENCE @ A GLANCE (22 Jan. 2013), http://politicalviolenceataglance.org/2013/01/22/is-the-

international-criminal-court-following-the-flag-in-mali/.

[41] *See, e.g.*, Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS J. 39 (2002); Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW UNIV. L. REV. 539 (2005); Ralph Henham, PUNISHMENT AND PROCESS IN INTERNATIONAL CRIMINAL TRIALS (2005); Mark Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS Q. 118 (2000).

[42] Drumbl, *supra* note 41, at 560.

[43] David E. Guinn, *Human Rights as Peacemaker: An Integrative Theory of International Human Rights*, 38 HUM. RTS. Q. 754, 771 (2016).

[44] Statement on Atrocities, *Moscow Conference, Statement on Atrocities, signed by President Roosevelt, Prime Minister Churchill and Premier Stalin (*1943), https://avalon.law.yale.edu/wwii/mosow.asp.

[45] SIKKINK, *supra* note 33, at 71.

[46] Teitel, *supra* note 32, at 77.

[47] Rome Statute of the International Criminal Court, *adopted* 17 July 1998, pmbl, U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (*entered into force* 1 July 2002). The drafters of the ICC's Rome Statute included references to both retributive and deterrence objectives in the preamble, which affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished" and that states parties are determined "to contribute to the prevention of such crimes." Restorative justice ideas are discernible in the ICC Statute's emphasis on victims' rights and victim participation.

[48] Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L. L. 7 (2001); Farer, *supra* note 7; critically Leslie Vinjamuri, *Deterrence, Democracy, and the Pursuit of International Justice*, 24 ETHICS INT'L. AFF. 191 (2010).

[49] Kenneth Anderson, *The Rise of International Criminal law: Intended and Unintended Consequences*, 20 EUR. J. INT'L. L. 331, 333–37 (2009); Vinjamuri, *supra* note 48, at 200.

[50] Anderson, *supra* note 49, at 334; CHANDLER, FROM KOSOVO TO KABUL, *supra* note 1.

[51] Chandra Lekha Sriram, *Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice*, 21 GLOB. SOC. 579 (2007).

[52] David Chandler, *The Responsibility to Protect? Imposing the 'Liberal Peace,'* 11 INT'L. PEACEKEEPING 59 (2004); Ramesh Thakur, *Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS*, 33 SECUR. DIALOGUE 323 (2002).

[53] The ICISS itself discarded the term "humanitarian intervention" in favor of "military intervention for human protection purposes." INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), THE RESPONSIBILITY TO PROTECT. REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY 9 (2001).

[54] *Id*.; GARETH J. EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIME ONCE AND FOR ALL (2008).

[55] EVANS, *supra* note 54, at 163; ICISS, *supra* note 53 at 24; see also Caroline Fehl, *Probing RtoP's Civilian Dimension: What Can Non-Military Sanctions Achieve?, in* THE RESPONSIBILITY TO PROTECT AND THE THIRD PILLAR. LEGITIMACY AND OPERATIONALIZATION 39 (Daniel Fiott & Joachim Koops eds, 2014).

[56] *ICISS*, *supra* note 53, at 8; *see also* EVANS, *supra* note 54, at 115–20.

[57] Vinjamuri, *supra* note 48.

[58] Kenneth A. Rodman, *Peace Versus Justice, in* ENCYCLOPEDIA OF GLOBAL JUSTICE 824 (Deen K. Chatterjee ed., 2011).

[59] Rome Statute, *supra* note 47, arts. 13, 16.

[60] In 2008 and 2013, the African Union unsuccessfully requested deferrals of ICC proceedings against Sudanese and Kenyan officials.

[61] JEAN-MARIE GUÉHENNO, THE FOG OF PEACE: A MEMOIR OF INTERNATIONAL PEACEKEEPING IN THE 21ST CENTURY 174 (2015).

[62] UN General Assembly, 62d Sess., Agenda Items 34, 86, Comprehensive Review of the Whole Question of Peacekeeping Operations in all Their Aspects: Letter dated 13 June from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary General, U.N. DOC. A/62/885 (2008).

[63] UN Secretary General, *Implementing the Responsibility to Protect: Report of the Secretary-General*, U.N. DOC. A/63/677 23 (2009).

[64] UN Secretary General, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect*, Report of the Secretary-General, U.N. Doc. A/69/981–S/2015/500 13 (2015).

[65] UN Secretary General, *Implementing the Responsibility to Protect: Accountability for Prevention. Report of the Secretary-General*, U.N. Doc. A/71/1016–S/2017/556 9 (2017).

[66] Ed Pilkington, *International Criminal Court to Investigate Libyan Violence*, THE GUARDIAN, (3 Mar. 2011).

[67] Permanent Mission of Switzerland to the United Nations, Letter addressed to H.E. Mr.

Mohammad Masood Khan, President of the Security Council for the month of January 2013 (2013), http://www.news.admin.ch/NSBSubscriber/message/attachments/29293.pdf.

[68] *Clinton Says Calling Assad a "War Criminal" Could Complicate Things*, NAHARNET (28 Feb. 2012), http://www.naharnet.com/stories/en/31606. "Peace versus justice" arguments lost traction as the hope for a negotiated solution evaporated, and the United States eventually came to support an ICC referral of the situation in Syria.

[69] Alex J. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, 19 ETHICS INT'L. AFF. 31, 34 (2005); Karen Engle, "*Calling in the Troops": The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS J. 189 (2007).

[70] Guinn, *supra* note 43, at 755–56.

[71] Meron, *supra* note 28, at 263–64.

[72] ICISS , *supra* note 53, at viii.

[73] *Id.* at xii.

[74] UN General Assembly, Resolution Adopted by the General Assembly. 60/1. 2005 World Summit Outcome, U.N. DOC. A/RES/60/1 (2005), ¶ 138 (24 Oct. 2005).

[75] While ethnic cleansing is not a separate crime under the Rome Statute, it has vast overlaps with genocide and crimes against humanity.

[76] Cristina G. Badescu & Thomas G. Weiss, *Misrepresenting R2P and Advancing Norms: An Alternative Spiral?*, 11 INT. STUD. PERSPECT. 354, 362 (2010).

[77] David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, *in* RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21ST CENTURY 77 (Richard H. Cooper & Juliette Voïnov Kohler eds, 2009).

[78] *Id.* at 134–35.

[79] Colum Lynch, *Gaddafi Is Subject of ICC Arrest Warrant*, WASH. POST (27 June 2011); *see also* Kersten, *supra* note 39.

[80] William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L. L. 701, 717 (2004).

[81] United States Mission to the United Nations, *Statement by Jamison S. Borek, Deputy Legal Adviser*, UNGA 6th Committee, USUN Press Release #182 (1995), www.iccnow.org/documents/US1PrepCmt1Nov95.pdf.

[82] Charles De Bock, *The Crime of Aggression: Prospects and Perils for the Third World*, 13 CHIN. J. INT'L. L. 91 (2014).

[83] Stefan Barriga, *Der Kompromiss von Kampala zum Verbrechen der Aggression. Ein Blick aus der Verhandlungsperspektive*, 11 Z. FÜR INT. STRAFRECHTSDOGMATIK 644 (2010); Claus Kreß & Leonie Von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L. CRIM. JUST. 1179 (2010); Christian Wenaweser, *Reaching the Kampala Compromise on Aggression: The Chair's Perspective*, 23 LEIDEN J. INT'L. L. 883 (2010).

[84] Rome Statute, *supra* note 47, art. 8 *bis3*, ¶ 1.An act of aggression was defined as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." *Id.* art. 8 *bis3*, ¶ 2.

[85] Barriga, *supra* note 83, at 645.

[86] *Cited in* Beth Van Schaack, Understanding Aggression II INTLLAWGRRLS (26 June 2010), http://www.intlawgrrls.com/2010/06/understanding-aggression-ii.html.

[87] Carsten Stahn, *Syria and the Semantics of Intervention, Aggression and Punishment*, 11 J. INT'L. CRIM. JUST. 955, 972–73 (2013).

[88] Rome Statute, *supra* note 47, art. 15 *bis5*.

[89] Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L. L. 257, 272 (2015).

[90] *Id.* at 273.

[91] Jennifer Trahan, One Step Forward for International Criminal law, One Step Backwards for Jurisdiction, OPINIO JURIS (2017), http://opiniojuris.org/2017/12/16/one-step-forward-for-international-criminal-law-one-step-backwards-for-jurisdiction-the-perspective-of-someone-present-at-the-un-during-negotiations/.

[92] *Id.*